

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 58 OF 2022

VEHICLE AND EQUIPMENT LTD.....PLAINTIFF

VERSUS

PAN AFRICAN EQUIPMENT (TANZANIA) LIMITED.....DEFENDANT

RULING

Date of Last order: 24/10/2022

Date of ruling: 29/11/2022

AGATHO, J.:

This ruling is in respect of preliminary objection on point of law raised by the defendant, against the competence of the commercial case No 58 of 2022. Perhaps it will be appropriate to set out the facts of this matter albeit in brief. It is undisputed that the plaintiff and defendant entered into product sale agreement on 7th March, 2016. Among other terms of the agreement was that the defendant to transfer ownership and to issue EFD receipts. Unfortunately, on 21st October, 2021 Tanzania Revenue Authority conducted a tax audit of the plaintiff where it was discovered that there were neither transfer ownership documents in the name of plaintiff nor was there any electronic fiscal device receipts issued by the defendant in respect of such transaction. Following that discovery, the plaintiff was ordered to pay disallowed depreciation tax arising from Komastu equipment transaction to

the tune of TZS. 11,105,498,956 as tax liability. Effort by plaintiff to have availed with tax and ownership transfer documents were in vain. That state of affair culminated into the institution of the instant suit claiming for compensation TZS. 11,105,498,956 as tax liability, reimbursement of USD 410,664.00, costs, interest, and general damages. Upon being served with the plaint, the defendant filed her written statement of defence and simultaneously raised a preliminary objection:

That, to the extent that the plaintiff's claims for compensation against the defendant of TZS. 11, 105,498,956.20 as tax liability allegedly paid by the plaintiff to Tanzania Revenue Authority (TRA) will require determination of (i) Whether the defendant was obliged under relevant tax laws to issue an EFD receipt to the plaintiff, (ii) Whether the alleged tax were correctly assessed and or paid by the plaintiff, and (iii) if such tax is payable by the defendant or the plaintiff then this court lacks jurisdiction to try the matter in terms of Section 7 of the Tax Revenue Appeal Act [Cap 408 R.E. 2019].

The Plaintiff was represented by Ms. Stella Rweikiza learned advocate on the other hand, the defendant was being represented by Mr. Gasper Nyika learned advocate. On 24th October, 2022 when the matter came for hearing, I issued a schedule of filing written submissions as follows, the defendant to file their written submission on or before 31st day of October, 2022, reply to written submissions by or on 14th November, 2022 and rejoinder if any by or 21st November, 2022. The parties duly complied with the schedule.

Submitting in support of the preliminary objection Mr. Nyika submitted that, jurisdiction is the bedrock on which the court's authority and competence to

entertain and decide matters rest. To back up his argument he cited the case of **Salim Kabora Vs. TANESCO & Others Civil Appeal No 55 of 2014 Court of Appeal (unreported) at page 13**. In that case the court insisted that, the issue of jurisdiction is very crucial since it is where the authority of the court to decide the matter that are litigated before it or take cognizance of matter prescribed in the formal way for its decision are derived. Further on jurisdiction, Mr. Nyika submitted that, the jurisdiction of the court can be limited by an express provision of law and where a certain law provides for specific forum to first deal with certain dispute, a resort to it first is imperative before one seeks recourse to the court. According to him, when that requirement is not adhered the attendant court's decision is rendered nullity. He placed his reliance on the case **Salim Kabora (supra)** cited with the approval in the case of **Tanzania Revenue Authority Vs Tanga Transport Company Limited, Civil Appeal No 84 of 2009 (unreported)** in which the court at pages 13 and 14 held that the limits of the court's authority are imposed by the statute and may be restrained by in either the kind and or nature of a claim.

Expounding his submission, on why this court lacks jurisdiction, Mr. Nyika Submitted that among the plaintiff claims against the defendant are compensation of TZS. 11,105,498,956.20 as tax liability alleged to have been paid by the plaintiff. According to Mr. Nyika since there is no established tax liability on the part of defendant and the same is denying to have any obligation under tax law or contract to issue EFD receipts then if at all this court will have to determine the instant suit, it will be required to look into the Stamp Duty Act, Cap 189, the Tax administration Act Cap, 438, The Value Added Tax Act, Cap 148 and the Income Tax Act, Cap 332 which are administered by Tanzania Revenue Authority in determination of the

following issues: (i) whether defendant under relevant tax law was obliged to issue an EFD receipt to the plaintiff for the sale of equipment subject of the suit (ii) Whether the tax assessed by TRA was a suit of the defendant refusal to transfer or rather whether the alleged defendant refusal to transfer could have led to the assessed tax (iii) Whether stamp duty was payable and the defendant is obliged under stamp duty laws to provide evidence of payment of such stamp duty and (iv) whether the alleged tax law was correctly assessed and or paid by the plaintiff and (v) whether such tax if any is payable by the defendant or the plaintiff. According to Mr. Nyika the applicable law are revenue laws in which this court has no jurisdiction.

The learned counsel for defendant also submitted that, the authority to determine issues related to tax dispute is vested only to Tax Revenue Appeal Board (herein referred as the Board). To support his submission the learned counsel referred this court to the provision of section 7 of the Tax Revenue Authority Appeal Act, [Cap 408 R.E. 2019] which provides that, the Board shall have sole original jurisdiction in all proceedings of Civil nature in respect of disputes arising from laws administered by Tanzania Revenue Authority. On that note, therefore, the learned counsel for defendant fully concluded that the dispute or claim on whether the defendant is liable to pay the tax alleged incurred by the plaintiff should be first dealt with by the TRA Board. To bolster his submission he referred the case of **Tanzania revenue Authority Vs. Tango Transport Company Limited Civil Appeal No 84 of 2009 (unreported)** at page 11 where the court held that:

“.... the High court eclipsed its authority by entertaining and determining chief issues on tax assessment and liability that were legally outside its competence is also plainly corroborated by the issues framed, namely, whether the

respondent had an existing tax liability payable to TRA at the time of the distress and how much? And whether the respondent's vehicles were lawfully detained. With respect, these live issues were plainly and manifestly taxation in nature"

In the fine, the learned counsel conclusively submitted that, this honourable court has no jurisdiction to determine the matter related to claim of tax liability of TZS. 11,105,498,956.20 because the High Court has no jurisdiction to entertain the claim of civil nature, arising from TRA's in administration of one of the Revenue laws. He referred this court to the case of **Bryson Bwire Mbone Vs Tanzania Revenue Authority, Civil Appeal No. 88 of 2018 Court Appeal (unreported)**.

Submitting against the preliminary objection, Ms. Rweikiza started her submission by giving brief history in the instant suit that the instant suit emanates from breach of product sale agreement. And plaintiff claim is for reimbursement of USD 410,664.44 and compensation TZS.11,105,498,956.20 as a tax liability paid to TRA due to the defendant's omission to issue EFD and transfer of ownership to the plaintiff. Ms. Rweikiza argued the preliminary objection on three points to wit: **one**, whether the objection raised constitute preliminary objection, **Two**, what is the jurisdiction of the Board under Section 7 of Tax Revenue Appeal Board Act [Cap 408 R.E. 2019] and **three**, whether Section 7 of the Tax Revenue Appeals Board Act oust the jurisdiction of this court over the cause of action pleaded in the plaint.

Submitting on the first point, the learned counsel for plaintiff submitted that, the raised preliminary objection did not meet the test elaborated in **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Limited [**

1969] E.A 696 which has been quoted with approval by the Court of Appeal in **Karata Ernest and others Vs Attorney General Civil revision No 10 of 2010 Court of Appeal (Unreported)**, where the court of appeal restated that "a preliminary objection is in the nature of what used to be a demurrer, it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side is correct".

According to Ms. Rweikiza the instant objection does not qualify as preliminary objection because it was raised on wrong assumption that, what is pleaded by defendant is correct while assuming that all facts pleaded by plaintiff are incorrect which need determination of three issues prefixing the raised objection. The learned counsel went on arguing that much as this preliminary objection is based on prefix issues then should be determined in normal manner of disposal of a suit on merit not at preliminary objection.

Submitting on the second point, the learned advocate for the plaintiff admitted that, the original jurisdiction of the Board is enshrined under section 7 of Tax Revenue Appeal Act. However, she was quick to point that, the test for determination original jurisdiction of the Board is genesis of the dispute and not which laws the court will look into but rather whether the dispute in present case arises from the administration of tax laws. To cement his argument, she referred this court to the case of **Khofu Mlelwa Vs. Commissioner General of TRA & Another Civil Appeal No 229 of 2019** and **Bryson Bwire Mbone Vs Tanzania Revenue Authority, Civil Appeal No. 88 of 2018 Court of Appeal (unreported)** in which the court held that a dispute is justifiable to the Board if it arises from the administration revenue laws administered by Tanzania Revenue Authority. She submitted further that, this court has jurisdiction to determine the matter because the genesis of the dispute under the second cause of action is the

omission by the defendant to issue EFD receipt and ownership transfer of documents to the plaintiff in respect of product sale agreement.

It was her submission on the third point that Tax laws are applicable in contractual and business relationships and imposes legal obligations to parties in the contract. According to Ms. Rweikiza, the legal obligation to issue fiscal receipts is impliedly in every agreement for sale of goods or service and where eligible person does not issue a fiscal receipt to the customer, when customer suffers damages for not having fiscal receipt it's a civil litigation and not tax dispute. According to learned counsel for plaintiff any litigation which does not involve Tanzania Revenue Authority is not a Tax dispute because it is only Tanzania Revenue Authority which has the mandate to administer Revenue laws. Ms. Rweikiza relied on **Mbago, Easy on Tax Dispute Settlement Procedure in Tanzania**, to define what is tax dispute. The learned counsel for plaintiff went on to point out that, dispute which does not involve TRA is not a tax dispute like this one at hand because none of the parties has statutory mandate to administer revenue laws or none of them has statutory power to assess, collect and account for revenue. According to her, since the plaintiff is not challenging any decision of the commissioners but rather, he is claiming for payment of compensation of tax liability arising due to breach of contractual obligation under product sale agreement, this court has jurisdiction to determine the instant suit. That is so because both original and appellate jurisdiction of the board is limited to decision or omission made by TRA in course of administration tax laws. She relied on decisions on the case of **Pan African Energy Tanzania Limited V. Commissioner General Civil Appeal No. 121 of 2018 (unreported)**, **Khofu Mlelwa Vs. Commissioner General of TRA & Another Civil Appeal No. 229 of 2019** and **Bryson Bwire Mbone Vs Tanzania**

Revenue Authority, Civil Appeal No. 88 of 2018 Court Appeal (unreported).

Ms. Rweikiza concluded by submitting that, the instant suit is a commercial significant one falling under paragraph (c), (d), and (e) of rule 2 of High Court Registries Rules and Rule 3 paragraph (c), (d) and (e) of the High court (Commercial Division) Procedural Rules 2012 and she distinguished cases cited by Mr. Nyika in support of preliminary objection because both cited cases were involving disputes against TRA in administration of revenue laws which is not the case here. On that note the learned counsel insisted that the preliminary objection be overruled with costs.

Having analyzed the submission made by the learned Advocates for and against the preliminary objection, and I appreciate the arguments by the learned counsel for the defendant that in terms of Section 7 of the Civil Procedure Code the High Court has jurisdiction to try all matters of civil suits except those of which their cognizance is either expressly or impliedly barred, and courts would not normally entertain a matter for which a special forum has been established. The learned counsel for defendant would like the court to agree with him that claim for compensation of TZS. 11,105,498,956.20 fall under the tax dispute which ought to be determined by special forum which is the Board. In the instant suit, it is established that plaintiff claim as pleaded under paragraph 3,10,11 and 12 of the plaint is a claim for payment of compensation of tax liability arising due to breach of contractual obligation under product sale agreement. On that bases I agree with the Ms. Rweikiza that the decision in **Bwire (supra) & TRA V Tango Transport (supra)** are distinguishable because both they were on administration of tax laws while the present suit is a civil action for compensation of tax liability emerging out of the breach of contractual obligation in product sale agreement.

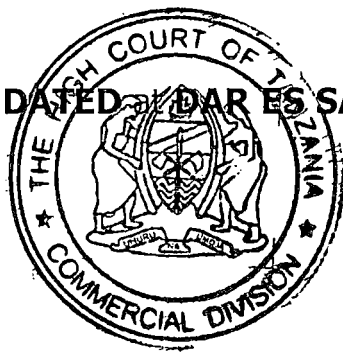
In addition, Mr. Nyika argued that this court has no jurisdiction to determine the instant suit for the laws applicable in determination of prefixed issues will require the court to look into the Stamp Duty Act, Cap 189, the Tax Administration Act Cap, 438, the value Added Tax Act, Cap 148 and Income Tax Act, Cap 332. With due respect, the learned counsel's argument is a misconception because the determinant factor of applicability of tax laws is whether a civil action arose from administration of revenue laws and the claim is inconsequential of the decision of the TRA. A scrutiny of Section 7 of the Tax Revenue Appeal Board Act [Cap 408 R.E. 2019] reveals that disputes which can be referred to the Board are those arising in the course of administration of Tax laws. For example, grievances by the taxpayer over tax decision or objection decision or other decisions made by Commissioner General in the administration of revenue laws. Therefore, by any stretch of imagination and in my view breach of contractual obligation and failure to issue EFD receipts is not among tax disputes arising in the administration of Tax laws because a dispute which does not involve TRA cannot be said to be a tax dispute arising from the administration of revenue laws. It is so because none of the parties has statutory mandate to administer revenue laws and the cited case of **Salimu Kabora (supra)** is distinguishable from this case. While in **Salimu Kabora** the dispute was disconnection of electricity in appellant's pharmaceutical business on a debt which the appellant was not ready to pay and that was within the regulated services of EWURA, in the present suit the plaintiff has no connection with TRA as such this court has jurisdiction.

Further, the submission by the learned counsel that the court in the determination of whether defendant under relevant tax law was obliged to issue an EFD receipt to the plaintiff for the sale of equipment subject of the

suit will require the court to look on tax laws, is an assumption contrary to what was established in **Mukisa Biscuits (supra)**. That is simply because the point of law must be pleaded or must arise as a clear implication from proceedings. Therefore, the act of the defendant counsel prefixing issues which were not pleaded offends the principle enunciated. I agree with the learned counsel for plaintiff that the preliminary objection did not meet the test of preliminary objection because the learned counsel for defendant made assumption on the use of Tax law the facts which certainly need this court to ascertain.

From the foregoing reasons, I find that the preliminary objection filed by defendant is devoid of merit and should not be allowed to stand in the path of the plaintiff's case. In the end, the preliminary objection is overruled with costs. For that matter, it is ordered that the case shall proceed from where it ended prior to the raising of the preliminary objection.

It is so ordered.



DATED: DAR ES SALAAM this 29th Day of November 2022.


U. J. AGATHO
JUDGE

29/11/2022

DATE: 29/11/2022:

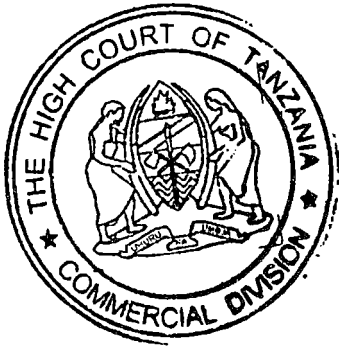
Coram: Hon. U.J. Agatho, J.

For Plaintiff: Stella Rweikiza, Advocate

For Defendant: Idrissa Juma, Advocate.

C/Clerk: Beatrice

Court: Ruling delivered today this 29th November 2022 in the presence of Stella Rweikiza learned counsel for the Plaintiff, and Idrissa Juma learned counsel for the Defendant.




U. J. AGATHO
JUDGE
29/11/2022